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Hong Leong Finance Bhd v Staghorn Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO B–02–132 OF 1995, B–08–183 OF 1995, B–02–138 OF 1995 AND B–02–228 OF 1995

ARFFIN BIN ZAKARIA, MOHD GHAZALI JJCA AND JAMES FOONG J

B 25 OCTOBER 2004

Land Law — Restraint on dealings — Caveats — Lien holder's caveat — Whether beneficial owner, other than registered proprietor could hand over document of title for creation of lien holder's caveat

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Land Law — Restraint on dealings — Caveats — Lien holder's caveat — Whether judgment obtained against borrower, who was not registered owner, under lien holder's caveat was valid — National Land Code 1965 s 218(2)

D *Land Law — Sale of land — Order for — Setting aside — Application to set aside order for sale after issuance of certificate of sale and successful public auction — Whether judge functus officio after order for sale was granted — When court permitted to depart from functus officio concept and set aside order for sale*

E The first and second defendants were the registered owners of the land. On or about 27 February 1981, the first and second defendants, as vendors, entered into a sale and purchase agreement ('the sale and purchase agreement') with the second intending interveners, Staghorn Sdn Bhd ('Staghorn') to sell the land whereby Staghorn paid the 10% of the purchase price to the vendors. However, the sale was completed not by Staghorn but by an associate

F company called Teck Lay Realty Sdn Bhd ('the third defendant') which paid the full balance of the purchase price and received from the vendors' solicitors the document of title to the land and the memorandum of transfer duly executed by the vendors.

G To finance the payment of the balance of the purchase price, the third defendant secured a loan from Bank Bumiputra Malaysia Bhd ('BBMB'). But instead of favouring BBMB with a first legal charge over the land, the document of title and the duly executed memorandum of transfer were handed over by the third defendant or its solicitors to Hong Leong Bank Bhd ('the plaintiff') to secure a third party legal charge for facilities given by the plaintiff to

H another associate company of Staghorn called Park Avenue Homes Sdn Bhd ('Park Avenue'). As for BBMB, it was only able to protect its interest with a private caveat placed on the land.

I When the plaintiff attempted to register a first legal charge over the land simultaneously with the transfer from the first and second defendants to the third defendant, it was prevented by the private caveat of BBMB. Thus the plaintiff registered a lien holder's caveat over the land.

Park Avenue failed in its obligation to repay the loan facilities. To enforce its security, the plaintiff applied to the High Court to foreclose the land under s 281 of the National Land Code ('NLC') based on the plaintiff's rights from its lien holder's caveat over the land. The court granted an order for sale to the plaintiff and a public auction was held where the first intervener was the successful bidder. He paid the full purchase price and was issued a certificate of sale.

Though successful, the first intervener was unable to effect the transfer of the land due to the existence of two caveats by Staghorn.

After one year 10 months from the date of the issuance of the certificate of sale, and two years after the successful auction, Staghorn applied to intervene in the foreclosure proceedings in the High Court, that the order for sale of the land and the public auction in consequent thereof be set aside and the grant of title to the land currently held by the plaintiff be handed over to Staghorn. Staghorn claimed as the beneficial owner of the land since it had paid 10% of the purchase price. Staghorn argued that the third defendant had paid on its behalf under a sort of internal inter-company arrangement 'which had nothing to do with the parties in these proceedings'.

The plaintiff maintained that the third defendant was the nominee of Staghorn and all contemporaneous documents point to this fact.

The learned judge of the High Court allowed Staghorn to intervene. The judge also ordered the order of sale and the sale by auction be set aside; and the document of title to the land to be delivered to Staghorn and that Staghorn be declared the rightful true beneficial owner of the land pursuant to the sale and purchase agreement.

Dissatisfied with these decisions of the High Court, the plaintiff and the first intervener appealed to the Court of Appeal which allowed the plaintiff's and first intervener's appeal. Subsequently, Staghorn appealed to the Federal Court. The Federal Court set aside the order of the Court of Appeal and ordered the case be reverted back to the Court of Appeal to hear all issues of the appeal 'except those issues within O 15 r 6 of the Rules of High Court 1980'.

The issues were: (1) whether a beneficial owner, other than the registered proprietor could hand over the document of title for the creation of a lien holder's caveat; (2) whether judgment obtained against a borrower, who was not the registered owner, under a lien holder's caveat was valid under s 218(2) of the NLC; (3) was the judge *functus officio* after an order for sale was granted; and (4) regarding the right to intervene.

Held:

(1) The only limitation imposed by the Federal Court relates to O 15 r 6 of the Rules of High Court 1980 ('the RHC') that arose from the decision

by this Court of 15 June 1995 that allowed the appeals of the plaintiff and first intervener (see para 21). The restriction placed upon this court by the Federal Court was only confined to the issue of there being no proceedings in existence after the order for sale and thus the court had no jurisdiction thereafter to make any order under O 15 r 6(2) (see para 23).

(2) It is material in the creation of a lien holder's caveat under s 281 NLC to have the registered proprietor to deposit the document of title to the lender for it is the registered proprietor who intends to surrender his rights to the lender to deal with the land in the event of default in repayment of the loan which he obtained from the lender. It does not extend to a beneficial owner who is yet to become a registered proprietor. Since this facility is only available to the registered proprietor, in the event of default in repayment of the loan, judgment must be obtained against the registered proprietor, as borrower. The wordings in s 281(2) NLC of a 'holder of any lien has obtained judgment for the amount due to him' is clear to this effect for there can be no one else other than the registered proprietor who is the borrower (see para 34).

(3) In this case all these provisions were contravened in the creation of the lien holder's caveat and the subsequent remedies resorted. The registered proprietors did not borrow any money from the plaintiff nor did they deposit the document of title with the plaintiff, and neither did the plaintiff obtain judgment on the amount due under the loan against them. When there were non compliance of the rules and procedure in the creation of the lien holder's caveat, and the fulfilment of the pre-condition for enforcement of the remedy subsequent to the failure in repayment of the loan, then the order for sale made in pursuant to s 281(2) NLC was tainted with illegality (see para 35).

(4) When the substantive law is breached the court is permitted to depart from the *functus officio* concept laid and set aside, *ex debito justitiae*, the order for sale (see para 36).

(5) With these, Staghorn had a right to apply to intervene. Staghorn was claiming that its rights would be affected by any judgment in the proceeding of this case and that it should not be deprived of a chance to be heard. A 'flexibility of approach' must be adopted (see para 37).

(6) The court disagreed with the learned judge in ordering the handing over of the document of title to Staghorn, more so declaring Staghorn as the 'rightful true beneficial owner of the said land' and instructing the document of title be registered in its name. In fact the two latter orders were not even requested by Staghorn in its application. There was no dispute that Staghorn paid 10% of the purchase price for the land but it had divested its rights and interest in the land to the third defendant who, in turn, had secured finances to pay off the balance of the purchase

price to the vendors. In the course of this, the land was incumbered. Toaccede to the demand of Staghorn for the return of the document of title was inequitable and without logic, and to register Staghorn as the registered proprietor far fetched when evidence positively identified the third defendant as the beneficial owner of the land that was to be charged to the plaintiff. Though the plaintiff was without the security of a lien holder's caveat, the plaintiff was not without interest over the land for the loan granted to the third defendant's nominee and registration of a first legal charge over the land awaits the third defendant to be registered as a proprietor (see para 39).

(7) As for the first intervener his right to the land was derived from the order for sale. Now that this order was considered null and void, the sale to him must naturally be annulled and rendered void. He would be entitled to receive back his money paid at the auction (see para 40).

[**Bahasa Malaysia summary**

Defendan pertama dan kedua adalah pemilik berdaftar sebidang tanah. Pada atau sekitar 27 Februari 1981, defendan pertama dan kedua, sebagai penjual-penjual, telah memasuki satu perjanjian jual beli ('perjanjian jual beli tersebut') dengan pencelah kedua, Staghorn Sdn Bhd ('Staghorn') untuk menjual tanah tersebut di mana Staghorn telah membayar 10% dari harga belian kepada penjual-penjual. Namun begitu jualan tanah tersebut tidak disempurnakan oleh Staghorn tetapi sebuah syarikat bersekutu yang bernama Teck Lay Realty Sdn Bhd ('defendan ketiga') yang mana telah membayar penuh baki harga belian dan menerima dari peguamcara penjual-penjual dokumen hakmilik tanah tersebut dan memorandum pindahmilik yang telah disempurnakan oleh penjual-penjual.

Untuk membiayai pembayaran baki harga belian, defendan ketiga telah mendapat satu pinjaman dari Bank Bumiputra Malaysia Bhd ('BBMB'). Akan tetapi gadaian pertama tanah tersebut tidak didaftarkan atas nama BBMB, sebaliknya dokumen hakmilik dan memorandum pindahmilik yang telah disempurnakan diserahkan oleh defendan ketiga atau peguamcaranya kepada Hong Leong Bank Bhd ('plaintif') untuk menjamin gadaian pihak ketiga untuk kemudahan pinjaman yang diberikan oleh plaintif kepada satu syarikat bersekutu Staghorn yang lain yang bernama Park Avenue Homes Sdn Bhd ('Park Avenue'). BBMB hanya dapat menjaga kepentingannya dengan memasukkan satu kaveat persendirian ke atas tanah tersebut.

Apabila plaintif cuba mendaftarkan gadaian pertama ke atas tanah tersebut bersekali dengan pindahmilik dari defendan pertama dan kedua kepada defendan ketiga, pendaftarannya dihalang oleh kaveat persendirian BBMB. Oleh yang demikian, plaintif mendaftarkan satu kaveat pemegang lien ke atas tanah tersebut.

A Park Avenue gagal membayar kemudahan pinjaman tersebut. Untuk menguatkuasakan jaminannya, plaintif memohon Mahkamah Tinggi untuk melelong tanah tersebut di bawah s 281 Kanun Tanah Negara 1965 ('KTN') berdasarkan hak-hak plaintif di bawah kaveat pemegang lien ke atas tanah tersebut. Mahkamah membenarkan satu perintah untuk jualan kepada plaintif
B dan satu lelongan awam diadakan di mana tawaran pencelah pertama berjaya. Beliau membayar penuh harga belian dan diberikan satu sijil jualan.

Walaupun berjaya, pencelah pertama tidak dapat melakukan pindahmilik tanah tersebut kerana terdapat dua kaveat yang dimasukkan oleh Staghorn.

C

Selepas setahun 10 bulan dari tarikh pengeluaran sijil jualan, dan selepas dua tahun dari lelongan tersebut, Staghorn memohon untuk mencelah prosiding lelongan di Mahkamah Tinggi, bahawa perintah jualan tanah tersebut dan lelongan awam tersebut diketepikan dan geran hakmilik tanah tersebut yang
D dipegang oleh plaintif diserahkan kepada Staghorn. Staghorn menuntut sebagai pemilik benefisial tanah tersebut kerana ia telah membayar 10% harga belian tanah tersebut. Staghorn menghujahkan bahawa defendan ketiga telah membayar bagi pihaknya di bawah satu transaksi antara syarikat 'yang mana tidak mempunyai kaitan dengan pihak-pihak di dalam prosiding ini'.

E

Plaintif menegaskan bahawa defendan ketiga adalah seorang penerima namaan Staghorn dan kesemua dokumen-dokumen semasa menunjukkan fakta ini.

Yang arif hakim Mahkamah Tinggi membenarkan Staghorn mencelah. Hakim juga memerintahkan perintah jualan dan jualan secara lelongan diketepikan;
F dan dokumen hakmilik tanah tersebut diserahkan kepada Staghorn dan bahawa Staghorn diisytiharkan sebagai pemilik benefisial tanah tersebut yang sebenar di bawah perjanjian jual beli tersebut.

Tidak puas hati dengan keputusan Mahkamah Tinggi, plaintif dan pencelah
G pertama merayu ke Mahkamah Rayuan yang mana telah membenarkan rayuan plaintif dan pencelah pertama. Staghorn seterusnya merayu ke Mahkamah Persekutuan. Mahkamah Persekutuan mengetepikan perintah Mahkamah Rayuan dan memerintahkan kes ini dikembalikan ke Mahkamah Rayuan untuk kesemua isu-isu rayuan didengar 'kecuali isu bidangkuasa di bawah A 15 k 6 Kaedah-
H Kaedah Mahkamah Tinggi 1980'.

Isu-isunya adalah: (1) sama ada pemilik benefisial, selain dari pemilik berdaftar boleh menyerahkan dokumen hakmilik untuk kemasukan kaveat pemegang lien; (2) sama ada penghakiman yang diperoleh terhadap seorang peminjam,
I yang bukannya pemilik berdaftar, di bawah kaveat pemegang lien adalah sah di bawah s 218(2) KTN; (3) sama ada hakim telah *functus officio* selepas satu perintah untuk jualan dikeluarkan; dan (4) mengenai hak untuk mencelah.

Diputuskan:

(1) Satu-satunya had yang diletakkan oleh Mahkamah Persekutuan berkait dengan A 15 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang berbangkit dari keputusan Mahkamah ini pada 15 Jun 1995 yang membenarkan rayuan-rayuan plaintif dan pencelah pertama (lihat perenggan 21). Had yang diletakkan oleh Mahkamah Persekutuan keatas Mahkamah ini hanya terhad kepada isu bahawa tiada prosiding ujud selepas perintah jualan dan dengan itu mahkamah tidak mempunyai bidang kuasa untuk membuat sebarang perintah di bawah A 15 k 6(2) (lihat perenggan 23).

(2) Ianya adalah material dalam membuat kaveat pemegang lien di bawah s281 KTN untuk pemilik berdaftar mendeposit dokumen hakmilik kepada pemberi pinjaman kerana pemilik berdaftarlah yang berniat untuk menyerahkan hak-haknya kepada pemberi pinjaman untuk berurusan dengan tanah tersebut jika berlaku pengingkaran pembayaran balik pinjaman yang diperolehnya dari pemberi pinjaman. Ianya tidak menjangkau kepada pemilik benefisial yang belum lagi menjadi pemilik berdaftar. Oleh kerana kemudahan ini hanya terbuka kepada pemilik berdaftar, jika berlaku pengingkaran pembayaran balik pinjaman, penghakiman hendaklah dimasukkan terhadap pemilik berdaftar, sebagai peminjam. Susunan kata-kata dalam s 281(2) KTN bahawa 'pemegang sebarang lien telah mendapat penghakiman untuk jumlah yang kena bayar kepadanya' jelas membawa kesan ini kerana tiada seorang pun selain dari pemilik berdaftar yang merupakan peminjam (lihat perenggan 34).

(3) Dalam kes semasa semua peruntukan ini bertentangan dengan pewujudan kaveat pemegang lien dan remedi-remedi yang kemudiannya diambil. Pemilik-pemilik berdaftar tidak meminjam sebarang wang dari plaintif ataupun menyimpan dokumen hakmilik dengan plaintif, dan plaintif tidak mendapat penghakiman terhadap mereka untuk wang yang kena bayar di bawah pinjaman tersebut. Apabila terdapat ketidakpatuhan kaedah-kaedah dan prosedur dalam mewujudkan kaveat pemegang lien, dan kegagalan memenuhi pra-syarat untuk penguatkuasaan remedi yang diakibatkan oleh kegagalan pembayaran balik pinjaman, maka perintah jualan yang dibuat di bawah s 281(2) KTN telah tercemar dengan kepenyalahan undang-undang (lihat perenggan 35).

(4) Apabila undang-undang substantif diingkari, mahkamah dibenarkan untuk menyimpang dari konsep *functus officio* dan mengetepikan, *ex debito justitiae*, perintah jualan (lihat perenggan 36).

(5) Dengan ini, Staghorn mempunyai hak untuk memohon untuk mencelah. Staghorn mengatakan yang hak-haknya akan dijejaskan oleh sebarang penghakiman di dalam prosiding kes ini dan ia patut diberi peluang untuk didengar. Pendekatan yang fleksibel wajar diambil (lihat perenggan 37).

(6) Mahkamah tidak bersetuju dengan yang arif hakim yang memerintahkan penyerahan dokumen hakmilik kepada Staghorn, lebih-lebih lagi pengisytiharan yang Staghorn adalah 'pemilik benefisial sebenar tanah tersebut' dan mengarahkan dokumen hakmilik didaftarkan atas namanya. Malahan kedua-dua perintah itu tidakpun dipohon oleh Staghorn dalam permohonannya. Tiada pertikaian yang Staghorn telah membayar 10% dari harga belian tanah tersebut akan tetapi ia telah melucutkan hak-hak dan kepentingannya ke atas tanah tersebut kepada defendan ketiga yang mana telah mendapat kemudahan pinjaman untuk membayar baki harga belian kepada penjual-penjual. Akibat daripada ini, tanah tersebut mempunyai bebanan. Untuk menurut tuntutan Staghorn tentang pengembalian dokumen hakmilik adalah tak ekuiti dan tak logik, dan untuk mendaftar Staghorn sebagai pemilik berdaftar adalah jauh sama sekali apabila keterangan jelas menunjukkan defendan ketiga sebagai pemilik benefisial tanah tersebut yang digadai kepada plaintif. Walaupun plaintif tidak mempunyai jaminan kaveat pemegang lien, plaintiff bukanlah tidak mempunyai kepentingan ke atas tanah tersebut kerana pinjaman yang diberikan kepada penerima namaan defendan ketiga dan pendaftaran gadaian pertama ke atas tanah tersebut tetap menunggu defendan ketiga didaftarkan sebagai pemilik (lihat perenggan 39).

(7) Berkenaan dengan pencelah pertama, haknya berpunca dari perintah jualan. Oleh kerana perintah ini telah diisytiharkan batal dan tak sah, maka jualan tanah tersebut kepada beliau mestilah menjadi batal dan tak sah juga. Beliau berhak mendapat kembali wang yang dibayarnya semasa lelongan tersebut (lihat perenggan 40).]

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3582–3673.

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3015–3312.

Cases referred to

Arab Malaysian Merchant Bank Bhd v Dr Jamaludin bin Dato Mohd Jarjis [1991] 2 MLJ 27 (refd)

Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd [1998] 1 MLJ 395 (refd)

MUI Bank Bhd v Cheam Kim Yu [1992] 2 MLJ 642 (refd)

Palaniappa Chetty v Ng Chin Pan [1922] 1 FMSLR 370 (refd)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)

Legislation referred to

National Land Code 1965 s 281, (1), (2)

Rules of High Court 1980 O 15 r 6

Appeal from: Originating Summons No 24–391 of 1990 (previously Originating Summons No S6–31–958 of 1988) (High Court, Shah Alam)

Yoong Sin Min (TY Ma with her) (Shook Lin & Bok) for the appellant in Civil Appeals No B–02–132 of 1995 and B–08–183 of 1995.

Yusuf Khan bin Ghows Khan (KL Wong and SL Lee with him) (Yusuf Khan, Foong & KS Tan) for the respondent in Civil Appeals No B–02–132 of 1995, B–08–183 of 1995, B–02–138 of 1995 and B–02–228 of 1995.

Joginder Singh (Joginder Singh & Co) for the appellant in Civil Appeals No B–02–138 of 1995 and B–02–228 of 1995.

James Foong J (delivering judgment of the court):

INTRODUCTION AND BACKGROUND

[1] There are four appeals before us. In order to appreciate the substance and form of these appeals it is necessary to understand the background of this case and the events that transpired.

[2] There is a piece of land held under CT 23316 for Lot 1996 in the Mukim of Semenyih, District of Ulu Langat, Selangor ('the said land'). The registered owners are the first and second defendants.

[3] On or about 27 February 1981, the first and second defendants, as vendors, entered into a sale and purchase agreement with the Second Intending Intervenes — Staghorn Sdn Bhd ('Staghorn') to sell the said land for a sum of RM3,024,110. Staghorn paid RM302,411 representing 10% of the purchase price, to the vendors. The material directors of Staghorn then were one Annuar bin Datuk Eusoff and Set Kon Kim ('Set'),

[4] However, the sale was completed not by Staghorn. An associate company called Teck Lay Realty Sdn Bhd, the third defendant, completed the purchase by paying the full balance of the purchase price and received from the vendors' solicitors the document of title to the said land and the memorandum of transfer duly executed by the vendors with the third defendant signing as the transferee.

[5] To finance the payment of the balance of the purchase price, the third defendant secured a loan from Bank Bumiputra Malaysia Bhd ('BBMB'). Butinstead of favouring BBMB with a first legal charge over the said land, the document of title and the duly executed memorandum of transfer were handed over by the third defendant or its solicitors to Hong Leong Bank Bhd, the plaintiff. This was to secure a third party legal charge for facilities given by the plaintiff to another associate company of Staghorn called Park Avenue Homes Sdn Bhd ('Park Avenue'). This security was an additional security to some lands situated in Johore, Accompanying the document of title and the duly executed memorandum of transfer was a resolution by the third defendant

to charge the said land to the plaintiff. To further protect the plaintiffs interest, the third defendant also executed a charge in escrow of the said land in favour of the plaintiff. As for BBMB, it was only able to protect its interest with a private caveat placed on the said land.

[6] When the plaintiff attempted to register a first legal charge over the said land simultaneously with the transfer from the first and second defendants to the third defendant, it was prevented by the private caveat of BBMB.

[7] To protect its legal interest before arrangement was made to remove BBMB's private caveat, the plaintiff registered a lien holder's caveat over the said land.

[8] Then before the plaintiff could proceed to effect the necessary registration, Park Avenue failed in its obligation to repay the loan facilities, whereupon the plaintiff sued Park Avenue for the loan advanced, and obtained judgement against it. To enforce its security, the plaintiff applied to the High Court to foreclose on the said land under s 281 of the National Land Code ('NLC'). This right is derived from the lien holder's caveat over the said land registered in the plaintiffs favour. Named as respondents in this foreclosure proceeding were: the first, second and third defendants. An order for sale ('Order for Sale') of the said land was granted on 9 August 1991.

[9] On the 16 November 1991, at the public auction of the said land held in pursuant to the Order for Sale, the first intervener was the successful bidder. He paid the full purchase price and was issued a certificate of sale by the High Court on 18 February 1991.

[10] Though successful, the first intervener was unable to effect the transfer of the said land to himself or his nominee due to the existence of two caveats: one by Set and the other by Staghorn, lodged on 21 January 1985 and 1 September 1992 respectively. By then, the caveat lodged by BBMB was withdrawn.

[11] After one year and 10 months from the date of the issuance of the certificate of sale, and two years after the successful auction, Staghorn applied to intervene in the foreclosure proceedings in the High Court. This application is listed as encl 77. The prayers requested are *inter alia*:

(1) Staghorn be allowed to intervene.

(2) That the order for sale of the said land and the public auction in consequent thereof be set aside.

(3) That the grant of title to the said land currently held by the plaintiff be handed over to Staghorn.

[12] The grounds proffered by Staghorn in support of this application are: Staghorn is actually the beneficial owner of the said land since it has paid 10% of the purchase price. Originally Staghorn intended to sell its beneficial interest

in the said land to the third defendant but this sale did not materialised. When this deal fell through, Staghorn claims that it continues to be its beneficial owner. Though admitting that Staghorn did not pay for the balance of the purchase price for the said land, Staghorn argues that the third defendant has paid on its behalf under a sort of internal inter company arrangement 'which has nothing to do with the parties in these proceedings'.

[13] The plaintiff rejected these assertions as preposterous. The plaintiff maintained that the third defendant is the nominee of Staghorn and all contemporaneous documents point to this fact viz: the execution by the third defendant as transferee on the memorandum of transfer; the resolution of the third defendant, signed by no other than Set himself, declaring the third defendant has agreed to charge the said land in favour of the plaintiff; the creation of the charge in escrow in favour of the plaintiff; the acknowledgement by the first and second defendants that the third defendant has paid the full purchase price and various others.

[14] On 30 January 1995 the learned Judge of the High Court allowed the first prayer for Staghorn to intervene.

[15] Then on 27 April 1995 the said judge granted a series of orders, some requested in encl 77 but not others. We shall list them all in accordance with the order of the learned judge dated 27 April 1995:

(i) that the said order of sale and the sale by auction conducted on 16 November 1991 in respect of the said land be set aside;

(ii) that the plaintiff or any party in possession of the document of title to the said land do deliver the same to Staghorn within 14 days of this order;

(iii) Staghorn be declared the rightful true beneficial owner of the said land pursuant to the sale agreement dated 27 February 1981 between the registered proprietors and Staghorn;

(iv) all relevant registered or to be registered memorials in favour of the plaintiff *inter alia* lien-holder's aaveat No 4556/81, the first intervenor, Wong Bin Chen @ Ng Cfli Leong *inter alia* caveat No 23889/91 and all those who claim interest(s) under them or any one of them *inter alia* caveat of NadiVelrta Sdn Bhd (nominee of the first intervenor) presentation No 3150/92 Vol 21 Folio 112, made in the register title and/or original issue document of title wherever they may appear be cancelled and thereby removed by the registrar of titles of State of Selangor, Shah Alam;

(v) the plaintiff whether by itself its agent(s) or by any other party(ies) who claim(s) interests under the plaintiff *inter-alia* whether it be the first intervenor herein himself or by the said NadiVelrta Sdn Bhd or otherwise whosoever or howsoever

who/which may be having control over or custody of the original issue document of title of the said land do deliver up the same within 14 days upon service of this order, to the counsel for Staghorn Sdn Bhd;

(vi) the learned deputy registrar (timbalan pendaftar) of the High Court, Malaya as an officer of the court be hereby authorised and empowered forthwith to execute for and on behalf of the registered proprietors whether deceased- or otherwise of the said land, State of Selangor, the memorandum of transfer and all other relevant or incidental documents therewith necessary to enable Staghorn to effect the registration of the transfer of the original issue document of title of the said land in favour of Staghorn;

(vii) the registrar of yitles of the State of Selangor, Shah Alam do register the said memorandum of transfer as directed hereunder to be executed in favour of Staghorn;

(viii) the plaintiff, the first intervener whether by itsetf or themselves or by all those who claim interests under it/them *inter alia* NadiVelita Sdn Bhd or otherwise whosoever or howsoever be restrained from lodging any other or further caveat(s) or other memorials based on the same claim(s) as has been litigated hereunder over the said land hereafter; and

(ix) the costs of these proceedings be paid to the second intervener by the plaintiff.

[16] Dissatisfied with these decisions of the High Court, the plaintiff and the first intervener appealed to the Court of Appeal and these are registered as:

[17] B02–132 of 1995 and B02–138 of 1995 being appeals by the plaintiff and the first intervener respectively against the decision of the High Court dated 30 January 1995 that allowed Staghorn to intervene.

[18] B08–183 of 1995 and B02–228 of 1995 being appeals by the plaintiff and the first intervener respectively against the decision of the High Court dated 27 April 1995 that granted all the orders specified in the order of the judge dated 27 April 1995.

[19] These four appeals were consolidated and heard by this court. On 15 June 1995, this court allowed the plaintiffs and the first intervened appeal (see the reported judgment of this court in [1995] 2 MLJ 849).

[20] Dissatisfied with this outcome, Staghorn appealed to the Federal Court. The Federal Court on 5 August 1997 set aside the order of the Court of Appeal of 15 June 1995 and ordered the case be reverted back to the Court of Appeal to hear all issues of the appeal 'kecuali atas isu bidangkuasa di bawah A 15, k6 Kaedah-Kaedah Mahkamah Tinggi 1980' (except those issues within O15 r 6 of the Rules of High Court 1980).

WHAT IS BEFORE THIS COURT? A

[21] Having revealed the chequered history of this case, it is pertinent to ascertain, at the outset, the extent of the restriction placed upon this court by the Federal Court in rehearing this appeal. It is our perception that the only limitation imposed by the Federal Court relates to O 15 r 6 of the Rules of High Court 1980 ('RHC 1980') that arose from the decision by this court of 15 June 1995 that allowed the appeals of the plaintiff and first intervener. We are of the view that the relevant provision under reference must be O 15 r 6(2)(b) RHC which reads: B

> At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application: C
>
> …
>
> (b) Order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or D
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter; E
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised. F

[22] When one examines the judgement of this court of 15 June 1995, the appeals were allowed solely on the issue of 'whether there were any proceedings in existence in this originating summons (encl 77) on 30 January 1995, when the order for intervention was made, or even on 4 December 1993 when the summons seeking intervention was issued'. Towards this the learned judges of this court were of this opinion: G

> We are of the view that after 18 February 1991, when the certificate of sale was issued by the registrar of the High Court, nothing further remained to be done in the proceedings. There were no proceedings in existence after that date. The court would have had no jurisdiction thereafter to make any order under O15 r 6(2). Theproceedings came to an end upon the issuance of the certificate of sale on the 18 February 1992, and *thereafter the order for intervention which was made on 30 January 1995, or the summons for leave to intervene which was Wednesday on 4 December 1993, had not been mede or issued 'at any stage of the proceedings' as required by O 15 r 6(2)*. This is because there was no stage in the proceedings in existence after the 18 February 1992 as the issuance of the certificate of sale pursuant to s 259(3)(a) of the Code was the final stage of the proceedings for an order for sale under O 83 (Emphasis added.) (See [1995] 2 MLJ 849 at para D.) H I

[23] On this, the Federal Court disagreed. Faced with this situation, we comprehend that the restriction placed upon us by the Federal Court is only confined to the issue of there being no proceedings in existence after the order for sale and thus the court had no jurisdiction thereafter to make any order under O 15 r 6(2).

APPROACH

[24] Since there are two sets of appeals before us, we decided to hear and deal with the first set of appeals involving the question of whether Staghom can intervene in the proceedings. If we rule in favour of Staghorn then we shall proceed with the second set of appeals. If Staghorn fails, then the second set of appeals should naturally be allowed.

IS STAGHORN ALLOWED TO INTERVENE IN THESE PROCEEDINGS?

[25] In dealing with an application to intervene in a proceeding under O 15 r 6 RHC, Lord Diplock's pronouncement in the *locus classicus* case of *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 at p 55 is well accepted:

> The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objectives of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for flexibility of approach which makes it desirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all case.

[26] Expanding further on whether a proposed intervener should possess a 'legal interest' to differentiate it from a 'commercial interests' the Privy Council in the same case expressed:

> A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action.

[27] The aforesaid principles were reaffirmed by the Supreme Court in a more recent case of *Arab Malaysian Merchant Bank Bhd v Dr Jamaludin bin Dato Mohd Jarjis* [1991] 2 MLJ 27 where Gunn Chit Tuan SCJ remarked:

> One of the class of cases covered by the said rule, which allows intervention by persons not parties, is where the proprietary or pecuniary rights for the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. The ambit of this class has been materially widened by the decision of the UK Court of Appeal in *Gurtner v Circuit* [1968] 1 All ER 328 (CA), the effect which is to include any case in which the intervener is directly affected not only to his legal rights but in his pocket.

[28] After perusing the High Court judgement of 30 January 1995, we are of the view that the learned judge in considering this application before him to intervene was firmly in grip of the aforesaid tests. But what is challenged by the plaintiff and the first intervener before us is the right of Staghorn to apply for intervention when the order of sale has been granted, the public auction successfully completed, and the certificate of sale issued by the High Court. By these, the High Court was *functus officio* in hearing encl 77.

[29] Before being accused of breaching the order of the Federal Court to entertain this issue, we must, first, distinguish this from that of the decision of this court handed down on the 15 June 1995 that consequent in the Federal Court's sanction. Going by the record, the Federal Court reverted these appeals back to us for reason that this Court had wrongly decided that encl 77 or the High Court order in allowing Staghorn to intervene should not be entertained because it was not issued or made at any stage of the proceedings as required by O 15 r 6(2) RHC; thus the restriction: 'kecuali atas isu bidangkuasa di bawah A 15, k 6, Kaedah-Kaedah Mahkamah Tinggi 1980'. But this does not prevent this court from dealing with the issue of '*functus officio*' which, according to legal definition, is 'A person who has discharged his duty; or whose office or authority has come to an end'. See *Mozley & Whiteley's Law Dictionary*; it is materially different from the previous ruling of 'there being no proceedings in existence'.

[30] This concept of *functus officio* is pertinent to this set of appeals in the light of the Supreme Court proposition in *MUI Bank Bhd v Cheam Kim Yu* [1992] 2 MLJ 642, which facts are materially similar to the present case. There, Harun Hashim SCJ declares:

> The application to intervene in the present proceedings was not made until a week after the issue of the certificate of sale by which time the auction sale was completed. The learned judge was clearly functus officio by then. Indeed, following *Hock Hua Bank Bhd v Sahari bin Murid*, the learned judge was *functus officio* after he made the order for sale on 29 August 1988. In *Hock Hua* case, the allegation of fraud and forgery were made after the judge had made the order for sale but before the auction sale and the Federal Court held that the judge was *functus officio* after he made the order for sale in foreclosure proceedings when the order had been drawn up and perfected. True, after making an order for sale, the judge has the power to make other orders, including changes in the reserve price and the auction sale dates, but such orders are consequential to the order for sale. The point here is that the order for sale is a final order unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is *functus officio* and therefore has no power to set aside the order for sale.

[31] But it is pertinent to note that in a later Federal Court decision of *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 395, an exception is made to the rule that a final order regularly obtained cannot be set aside except on appeal. Mohd Azmi FCJ, when delivering one of the judgments in that case described the exception in this fashion:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders *which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction.* It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (Emphasis added.)

[32] We are of the view that the facts in our instant case fall within the exceptions as pronounced in *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd*. There was contravention of a substantive statutory provision. The learned judge in the court below is right when he ruled that the mandatory requirement for the creation of the lien holder's caveat was not complied with. It was the third defendant or its solicitors who deposited the document of title of the said land with the plaintiff, and the loan was for the nominee of the third defendant, not the registered proprietors. The registered proprietors (first and second defendants) did not borrow from the plaintiff and neither did they, or their solicitors, deposited the document of title with the plaintiff. Naturally, when there was a default in the repayment of the said loan, judgement against the borrower was obtained against Park Avenue Homes Sdn Bhd instead of the registered proprietors by the plaintiff. All these contravened the statutory requirements set out in s 281(1) and (2) NLC which state:

> (1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body:
>
> (a) may thereupon apply under chapter 1 of Part 19 for the entry of a lien-holder's caveat; and
>
> (b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.
>
> (2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the court for, and obtain forthwith, an order for the sale of the land or lease.

[33] The rational of these requirements are well explained by Whitely JC in the Court of Appeal case of *Palaniappa Chetty v Dupire Brothers & Anor*. In the suit *Palaniappa Chetty v Ng Chin Pan* [1922] 1 FMSLR 370:

> The following definition is given in *Halsbury's Laws of England* (Vol 19) p 2:
>
> Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another man until certain demands of the person in possession are satisfied.

Applying this definition to the present case, the appellant had the right to retain grant 5,138 until the loan in respect of which it was deposited was repaid. The right of retention is inconsistent with the exercise by the registered proprietor of his right to deal with the land. The registered proprietor, therefore, has, for the purposes of the lien, surrendered that right. It follows, I think, that he has pledged the land as security for the loan, and has conferred upon the lien-holder a right analogous to that possessed by an equitable mortgagee in countries where such mortgages are recognised.

That the Registration of Titles Enactment (the forerunner to NLC) recognises the right to be of that character is, I think, evident from that part of s 80 (similar to s281 NLC) which provides that a lien holder may enter a caveat. That policy of the Enactment is to restrict the right to enter a caveat to persons who have, or who claim to have, an interest in the land. The conferring of this right upon a lien holder is conclusive evidence to my mind that Legislature intended the debt due by the registered proprietor to the lien holder to be a charge upon the land.

[34] Thus it is material in the creation of a lien holder's caveat under s 281 NLC to have the registered proprietor to deposit the document of title to the lender for it is the registered proprietor who intends to surrender his rights to the lender to deal with the said land in the event of default in repayment of the loan which he obtained from the lender. As a borrower, no other person can substitute the registered proprietor in performing this task of depositing the document of title with the lender for the creation of this statutory instrument. To allow this would defeat the concept of the right of the registered proprietor to deal with his own land. Section 281 NLC is intended for a registered proprietor to raise money on loan, speedily, by depositing the document of title registered in his name with the lender as compared with the more complex process of registering a legal charge over the land. But as the law demands, it is only available to a registered proprietor who borrows money and deposits his title with the lender. It does not extend a beneficial owner who is yet to become a registered proprietor. Since this facility is only available to the registered proprietor, in the event of default in repayment of the loan, judgment must be obtained against the registered proprietor, as borrower. The wordings in s281(2) NLC of a 'holder of any lien has obtained judgment for the amount due to him' is clear to this effect for there can be no one else other than the registered proprietor who is the borrower.

[35] As disclosed, all these provisions were contravened in the creation of the lien holder's caveat and the subsequent remedies resorted. The registered proprietors did not borrow any money from the plaintiff nor did they deposit the document of title with the plaintiff, and neither did the plaintiff obtain judgment on the amount due under the loan against them. When there were non compliance of the rules and procedure in the creation of the lien holder's caveat, and the fulfilment of the pre-condition for enforcement of the remedy subsequent to the failure in repayment of the loan, then the order for sale made in pursuant to s 281(2) NLC is tainted with illegality.

[36] When the substantive law is breached the court is permitted to depart from the functus officio concept laid down in *MUI Bank Bhd v Cheam Kim Yu*, and set aside, *ex debito justitiae*, the order for sale under the rule expressed in *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd*.

[37] With these, we find that Staghorn has a right to apply to intervene. We also agree with the finding of the learned judge in allowing Staghorn to intervene since Staghorn is claiming that its rights would be affected by any judgment in the proceeding of this case and that it should not be deprived of a chance to be heard. As advised by the Privy Council in *Pegang Mining* a 'flexibility of approach' must be adopted.

SECOND SET OF APPEALS

[38] As Staghorn can intervene in these proceedings, we shall proceed to consider the other orders of the learned judge dated 27 April 1995.

[39] Though we agree on the invalidity of the lien holder's caveat and the order for sale made thereunder, we are not in agreement with the learned judge in ordering the handing over of the document of title to Staghorn, more so declaring Staghorn as the 'rightful true beneficial owner of the said Land' and instructing the document of title be registered in its name, In fact the two latter orders are not even requested by Staghorn in its application. There is no dispute that Staghorn paid 10% of the purchase price for the said land but it has nominated the third defendant as the purchaser. All documentary evidence concludes that Staghorn has divested its rights and interest in the said land to the third defendant who, in turn, had secured finances to pay off the balance of the purchase price to the vendors. In the course of this, the land is incumbered. To accede to the demand of Staghorn for the return of the document of title, is, in our view, inequitable and without logic, and to register Staghorn as the registered proprietor far fetched when evidence positively identifies the third defendant as the beneficial owner of the said land that is to be charged to the plaintiff. Though the plaintiff is without the security of a lien holder's caveat, the plaintiff is not without interest over the said land for the loan granted to the third defendant's nominee and registration of a first legal charge over the said land awaits the third defendant to be registered as a proprietor.

[40] As for the first intervener his right to the said land is derived from the order for sale. Now that this order is considered null and void, the sale to him must naturally be annulled and rendered void. He would be entitled to receive back his money paid at the auction.

[41] By these reasons, we find the learned judge has erred in granting some of the orders in favour of Staghorn. To be more precise, we only affirm orders number (i) and (ix) and set-aside orders numbering (ii), (iii), (iv), (v), (vi), (vii), (viii) of the order of the judge dated 27 April 1995. As for the document of title

to the said land which is presently in the hands of a stakeholder, Ms KL Wong, Advocates and Solicitors, we order that this is to be delivered to the plaintiff forthwith.

[42] As regards to cost of this appeal, we order that each party bears its own cost.

Order accordingly.

Reported by Loo Lai Mee